

OCT 7 1940

CHARLES ELMORE CROPLEY
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 486

MADELEINE D. POWERS,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

**Petition for a Writ of Certiorari to the United States
Circuit Court of Appeals for the First
Circuit and Brief in Support**

RALPH G. BOYD,

Attorney for Petitioner.

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COMMISSIONER OF INTERNAL REVENUE,

Respondent.

**Petition for a Writ of Certiorari to the United States
Circuit Court of Appeals for the First Circuit.**

To the Honorable The Chief Justice and The Associate
Justices of the Supreme Court of the United States:—

The petitioner, Madeleine D. Powers, respectfully petitions this Court to require by certiorari to the United States Circuit Court of Appeals for the First Circuit that it certify to this Court for review and determination the cause wherein said Circuit Court of Appeals on July 16, 1940 entered its final decree reversing the decision of the United States Board of Tax Appeals holding that there was no deficiency in the petitioner's gift tax for 1935 and remanding the case to said Board for further proceedings not inconsistent with the opinion passed down by said Circuit Court of Appeals on said day.

OPINIONS BELOW

The memorandum findings of fact and opinion of the United States Board of Tax Appeals entered January 9, 1939 is not reported but appears at R. 15-19. The opinion of the Circuit Court of Appeals and concurring opinion entered July 16, 1940 are not yet officially reported but appear at R. 41-48.

STATEMENT OF MATTER INVOLVED

This cause involves an alleged deficiency in the petitioner's gift tax for 1935.

In late November and early December, 1935, the petitioner purchased six single premium policies of life insurance, three ordinary life policies on her own life and three ten-year endowment policies on the life of a daughter. (R. 16.) On December 30 and 31, 1935, the petitioner, who had retained the right to change the beneficiaries of the policies in which she was named insured and who was entitled to the proceeds of the other policies if living at the time the proceeds became payable, made gifts of the policies in the form of irrevocable assignments to her husband and the Massachusetts Hospital Life Insurance Co., as trustees. (R. 17.)

In her gift tax return for the year 1935 the petitioner computed the total value of the policies as \$233,360.30, which was the cash surrender value of the policies on the date of the gift, and a tax was paid on that basis. (R. 19.) This the petitioner believed was in accordance with the regulation then in effect, Art. 2 (5) of Treasury Regulations 79, as approved October 30, 1933, which provided as follows:

“(5) The irrevocable assignment of a life insurance policy, of the naming of the beneficiary of a policy without retaining any of the legal incidents of ownership therein, constitutes a gift in the amount of the net

cash surrender value, if any, plus the prepaid insurance adjusted to the date of the gift."

On February 26, 1936 a new edition of Treasury Regulations 79 was approved which provided in Art. 19 (9) that where a donor, owning a life insurance policy on which no further payments are to be made to the company, for example, a single premium policy, makes a gift of the contract, the value of the gift is the amount which the company would charge for a single premium contract of the same specified amount on the life of a person of the age of the insured. Following this, the respondent Commissioner of Internal Revenue under date of November 30, 1936 mailed petitioner notice of a deficiency of \$4,134.52. (R. 5.) This was based upon a valuation of \$273,149.58 (R. 19), which was the total amount originally paid by the petitioner for the policies, her age in years being the same on the date of the gift as on the date the policies were issued.

On February 26, 1937 petitioner filed with the United States Board of Tax Appeals a petition for redetermination of the alleged deficiency (R. 1, 3), hearing was had (R. 2), and on January 9, 1939 the Board of Tax Appeals, adhering to its conclusion reached in *Ernest A. Cronin*, 37 B.T.A. 914 (1938), and *Mary H. Haines*, 37 B.T.A. 1013 (1938), made a finding of fact that the total value of the gifts when made was \$233,360.30 and entered its decision that there was no deficiency in the petitioner's gift tax for 1935. (R. 19.)

On March 29, 1939 respondent Commissioner petitioned the United States Circuit Court of Appeals for review of the decision by the Board of Tax Appeals. (R. 20.) The cause was heard by said Court on April 17, 1940, the Honorable Calvert Magruder and the Honorable John C. Mahoney, Circuit Judges, and the Honorable George C. Sweeney, District Judge, sitting, and on July 16, 1940 it handed down an opinion, per Sweeney, J. (R. 41-47), and a concurring

opinion, per Magruder, J. (R. 47-48), reversing the decision of the Board of Tax Appeals and remanding the case to the Board for further proceedings not inconsistent with the opinion of said Court. The opinion of said Court concluded as follows (R. 47):

"We therefore reject the theory that the cash surrender value of the policies, or even the reserves of the policies, was the test of their value on the date of transfer, and think that the Commissioner assessed the tax on the minimum proper basis, namely, the cost of the policies to the donor."

It is the foregoing decision of said Circuit Court of Appeals which the petitioner seeks to have reviewed.

JURISDICTION

The final decree of the Circuit Court of Appeals was entered July 16, 1940 and mandate was stayed on July 31, 1940 until further order of said Court. The jurisdiction of this Court is invoked under the provisions of Section 240 (a) of the Judicial Code, 28 U. S. Code §347a, as amended by the Act of February 13, 1925.

STATUTE INVOLVED

The statute involved is Section 506 of the Gift Tax Act of 1932 (47 Stat. 248) which provides as follows:

"If the gift is made in property, the value thereof at the date of the gift shall be considered the amount of the gift."

QUESTIONS PRESENTED

There is no dispute that the petitioner made gifts of the six single premium life insurance policies in 1935 or that they were subject to a gift tax. The only questions are:

1. What was the value of the policies at the date of the gifts for purposes of Section 506 of the Gift Tax Act of 1932 (47 Stat. 248); and

2. Was determination of the value of the policies a question of fact to be determined from all the attendant circumstances, and if so, could the Circuit Court of Appeals in effect substitute its judgment concerning such fact for that of the Board of Tax Appeals by reversing the Board's decision and remanding the case to the Board for further proceedings not inconsistent with said Court's opinion?

REASONS WHY THE WRIT OF CERTIORARI SHOULD ISSUE

The decision by the Circuit Court of Appeals for the First Circuit in this case as to the value of life insurance policies for gift tax purposes is in conflict with the decisions of the Circuit Court of Appeals for the Third Circuit (*Commissioner v. Haines*, 104 F. (2d) 854), the Fourth Circuit (*Helvering v. Bryan*, 109 F. (2d) 430), the Seventh Circuit (*Ryerson v. United States*, Nos. 7133 and 7134, October Term, 1939, decided July 9, 1940) and the Eighth Circuit (*Helvering v. Cronin*, 106 F. (2d) 907). It is in accord with the decision of the Circuit Court of Appeals for the Second Circuit in *Guggenheim v. Rasquin* (110 F. (2d) 371), now pending before this Court upon petition for writ of certiorari, October Term, 1939, No. 1030, October Term, 1940, No. 92. Other cases are pending awaiting settlement of this conflict. It is of major importance both from the standpoint of administering the Gift Tax Act and from the standpoint of the general public which invests in life insurance that this question should be settled.

The decision of the Circuit Court of Appeals in this case is also probably in conflict with the applicable decisions of this Court as to whether the determination of such value is a question of fact to be determined from all the attendant circumstances. Compare *Elmhurst Cemetery Co. v. Commissioner*, 300 U.S. 37, 40 (1937); *The Minnesota Rate Cases*, 230 U.S. 352, 434 (1912). On that basis it departs

from the accepted and usual course of judicial review of decisions by administrative agencies in a manner warranting the exercise of this Court's power of supervision.

These questions, as presented in this case, are important not alone in regard to the valuation of life insurance policies; they also have an important bearing upon the whole field of valuation for estate and gift tax purposes. Compare *Helvering v. Safe Deposit & Trust Co. of Baltimore*, 95 F. (2d) 806, 811, 812 (C.C.A. 4th, 1938); *Commissioner v. Shattuck*, 97 F. (2d) 790, 792 (C.C.A. 7th, 1938).

PRAYER

For the foregoing reasons, your petitioner prays that a writ of certiorari issue out of this Court to the United States Circuit Court of Appeals for the First Circuit, commanding said Court to certify and send to this Court on a day to be determined a full and complete transcript of the record of all the proceedings of such Circuit Court of Appeals had in this case, to the end that this cause may be reviewed and determined by this Court; that the judgment of the Circuit Court of Appeals be reversed; and that petitioner be granted such other and further relief as may be proper.

MADELEINE D. POWERS

By RALPH G. BOYD,
Her Attorney.

Boston, Massachusetts
October, 1940.

Brief in Support of Petition for Certiorari

The question of determining the value of life insurance policies for gift tax purposes is also presented by *Guggenheim v. Rasquin*, 110 F. (2d) 371 (C.C.A. 2nd), now pending before this Court on petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit, October Term, 1939, No. 1030, October Term, 1940, No. 92. In that case all of the policies were single premium policies which were assigned either at the time of taking them out or prior to formal issuance. It is not stated in the opinion of the Circuit Court of Appeals for the Second Circuit (110 F. (2d) 371) whether the policies were in the form of ordinary life policies or endowment policies. In the instant case a substantial period elapsed between the date when the policies were issued and the date of the irrevocable assignment and all six of the policies were single premium policies but three were ordinary life policies and three were ten-year endowment policies. The Solicitor General has filed a memorandum on behalf of the respondent in *Guggenheim v. Rasquin*, *supra*, stating that he does not oppose the granting of a writ of certiorari in that case in view of the conflict with *Commissioner v. Haines*, 104 F. (2d) 854 (C.C.A. 3d), *Helvering v. Cronin*, 106 F. (2d) 907 (C.C.A. 8th), and *Helvering v. Bryan*, 109 F. (2d) 430 (C.C.A. 4th), the fact that the same question is involved in other cases now pending, and the further fact that it is important from an administrative standpoint that the question be settled. The instant case is also in conflict with the cases above referred to and—with *Guggenheim v. Rasquin*—is now also in conflict with a fourth case, *Ryerson v. United States*, Nos. 7133 and 7134, October Term, 1939, decided by the Circuit Court of Appeals for the Seventh Circuit on July 9, 1940, but not yet officially reported. The types of policies here involved and the circumstances of this case, especially when they are compared with the policies and circumstances involved in *Guggenheim v. Rasquin* and the conflicting cases

above referred to, make it of first importance both from an administrative standpoint and from the standpoint of the general public, that this case be reviewed and determined as well as the *Guggenheim* case.

There is more to the instant case, however, than the single question what is the value of certain single premium life insurance policies for purposes of the gift tax. The instant case also raises an important question as to whether determination of the value of life insurance policies for gift tax purposes is a question of fact, and if so, whether the Circuit Court of Appeals can, by reversing the Board of Tax Appeals' decision and remanding the case to the Board for further proceedings not inconsistent with its opinion, in effect substitute its judgment concerning such fact for that of the Board. The Board of Tax Appeals, in line with *Elmhurst Cemetery Co. v. Commissioner*, 300 U.S. 37 (1937), considered its determination of value to be one of fact. (R. 19, and see *Ernest A. Cronin*, 37 B.T.A. 914, 920 (1938)), but the Circuit Court of Appeals disregarded this consideration and by its final decree effectively limited the Board to a determination in accordance with the judgment of value of the Circuit Court of Appeals. This it is submitted is probably in conflict with the applicable decisions of this Court (see *Elmhurst Cemetery Co. v. Commissioner*, 300 U.S. 37, 40 (1937)) and, on that basis, departs from the accepted and usual course of judicial review of decisions by administrative agencies to such an extent as to warrant an exercise of this Court's power of supervision.

While this second question is a separate and important question in the instant case, the two cases, *Guggenheim v. Rasquin* and the instant case, might conveniently be heard and determined together.

Respectfully submitted,

RALPH G BOYD

Attorney for Petitioner.

Boston, Massachusetts,
October, 1940.